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Supreme Court of the United States

OCTOBER TERM, 1946

No. 53 84.

UNIVERSAL PICTURES COMPANY INC. (sued herein as Universal Corporation and Universal Pictures Company Inc.), UNIVERSAL FILM EXCHANGES INC., and BIG U FILM EXCHANGE, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee,

and

PARAMOUNT PICTURES INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., WARNER BROS. PICTURES DISTRIBUTING CORPORATION (sued herein as Vitagraph, Inc.), WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, COLUMBIA PICTURES OF LOUISIANA, INC., SCREEN GEMS, INC., and UNITED ARTISTS CORPORATION,

Defendants.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT OR DECREE HEREIN

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In compliance with Rule 12 of the Supreme Court of the United States, as amended, Universal Pictures Company, Inc., (sued herein as Universal Corporation and

Universal Pictures Company Inc.), Universal Film Exchanges Inc., and Big U Film Exchange Inc., defendants-appellants herein, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment and decree of the District Court of the United States for the Southern District of New York, specially constituted under Title 15, Section 28 of the United States Code, entered in this cause on the 31st day of December, 1946, on which day the said District Court also filed its findings of fact and conclusions of law.

The defendants-appellants filed timely motions for substantial amendment of the Court's' findings, conclusions and judgment or decree. The Court denied these motions on the 3rd day of February, 1947. A petition for appeal is presented to the District Court herewith.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment and decree entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 U. S. C. Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. Sec. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Crescent Amusement Co.*, 323 U. S. 173;

Interstate Circuit Inc. v. *United States*, 306 U. S. 208;

Sugar Institute, Inc. v. *United States*, 297 U. S. 553;

United States v. *Bausch & Lomb Optical Co.*, 321 U. S. 707.

Statutes Involved

The United States Statute under which the case was prosecuted was the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever;

* * *

Sec 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * *

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays:
* * *

Nature of the Case, Rulings of the Court, and Substantial Questions Involved

This was a proceeding in equity brought by the United States of America under Section 4 of the Sherman Anti-Trust Act to enjoin the defendants from contracting, combining and conspiring to restrain interstate commerce in motion pictures, and from monopolizing, attempting to monopolize and combining and conspiring to monopolize such interstate commerce, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. Venue was laid in the Southern District of New York.

The original petition was filed on July 20, 1938. Defendants answered the petition and denied the material allegations thereof. The case first came on for trial on June 1, 1940. Before any testimony was taken, negotiations were begun between the Government and the so-called "major defendants" for the disposition of the cause by Consent Decree. An amended and supplemental complaint was filed on November 14, 1940, and the defendants filed answers denying material allegations thereof. On November 20, 1940, a Consent Decree was entered into between the Government and the "major defendants", pursuant to which they subjected their businesses to regulation as agreed, in respect of certain trade practices in the licensing of motion pictures, and consented to the establishment of an arbitration system to enforce the provisions of the Decree.

Dissatisfied with the operation of the Consent Decree, the Government moved on March 5, 1945, to set the case for trial and filed an application pursuant to the Expediting Act, 15 U. S. C. Sec. 28, for the appointment of a special three-judge Court to hear and determine the issues raised

by the amended and supplemental complaint and the answers thereto. This Court was duly constituted with Judges Augustus N. Hand, Circuit Judge, and Henry W. Goddard and John Bright, District Judges, and the trial proceeded before the Court as so constituted, commencing on the 8th day of October, 1945, and concluding on November 20, 1945, except for argument. The Government introduced over 400 exhibits, but called no witnesses whatever. Several thousand pages of testimony were taken from witnesses called by the defendants, who also offered a considerable number of exhibits. The case was argued the middle of January, 1946, and the Court rendered its opinion on June 11, 1946. On October 20th and 21st, 1946, it heard argument as to the form of its finding of fact, conclusions of law and judgment or decree. On December 31, 1946, it filed its finding of fact and conclusions of law and entered its judgment or decree with supplemental opinion. Copies of the opinion and supplemental opinion are annexed hereto as Exhibits A and B. Timely motions to amend made by all of the defendants were denied on February 3, 1947, except that the effective dates of certain provisions of the decree were extended.

The plaintiff requested injunctive relief against the violations charged, and prayed that the five major producer-distributors be required to divest themselves of their theatres which had allegedly been employed to monopolize interstate commerce. As it was conceded by the plaintiff at the trial that there was active competition in the production of motion pictures, the charges in respect thereto were formally abandoned by the plaintiff and dismissed by the Court in its decree.

Those defendants, who were referred to by the Government as the "major defendants" or the "big five", were five

integrated businesses, engaged in all three phases of the motion picture industry, to wit, the production of motion pictures (mainly in the State of California), the distribution thereof (i.e., the licensing under copyright to an exhibitor of the intangible exhibition rights to a picture accompanied by a temporary bailment of a positive print of the negative film) among some 18,000 theatres located throughout the United States, and the exhibition of said motion pictures to the public in return for the payment of an admission charge.

The "major defendants" (hereinafter sometimes referred to as Paramount, Loew's, RKO, Warner's and Fox) were: Paramount Pictures Inc. and a subsidiary, Loew's Inc., Radio-Keith-Orpheum Corporation and its subsidiaries, Warner Bros. Pictures Inc. and its subsidiaries, and Twentieth Century-Fox Film Corporation and its subsidiaries. The foregoing defendants are sometimes referred to as the integrated defendants, or the producer-distributor-exhibitor defendants, or the producer-exhibitor defendants.

In addition to the "major defendants" the Government named as defendants, Columbia Pictures Corporation and its subsidiaries (hereinafter sometimes called Columbia), Universal Corporation and its subsidiaries (hereinafter sometimes called Universal) and United Artists Corporation (hereinafter sometimes called United Artists). None of these companies possessed any theatres, the operations of Columbia and Universal being confined to the production and distribution of motion pictures, and the operations of United Artists being confined to the distribution thereof. These defendants were referred to by the Government as the "little three".

Producer-distributors other than the defendants were referred to by the Government as "independents", and the

largest of these are Monogram Pictures Corporation, Republic Pictures Corporation and Producers Releasing Corporation.

Motion pictures are classified into features, short subjects and news reels. A feature is a motion picture which is over 4,000 feet in length. The case was mainly concerned with the production, distribution and exhibition of features, by all odds the most important part of the business.

Each of the defendant-distributors maintains so-called exchanges suitably located throughout the United States, in order to solicit license agreements for the exhibition of its pictures in theatres situated throughout the territory served by the exchange, and for the physical distribution of positive prints throughout this territory.

The 18,000 motion picture theatres in the country are divided into "affiliated theatres" (which are theatres owned, controlled or managed by a major distributor, or in the ownership, control or management of which a major distributor has a financial interest) and unaffiliated theatres. These unaffiliated theatres are in turn divided into independent circuit theatres and independent theatres. A circuit theatre is a theatre which is a member of a theatre chain, which is defined in the amended and supplemental complaint (hereinafter sometimes called the complaint), upon which the case was tried, as "a group of more than five theatres owned, controlled or managed by the same person, partnership or corporation; or a group of more than five theatres which combine with each other, through a common agent, in licensing film". Any theatre which is not a "circuit theatre" or an "affiliated theatre" is defined in the complaint as an "independent theatre".

Motion picture theatres are also classified in accordance with the run upon which, *i.e.*, the order in which, they are licensed to show pictures which have been released. First-run theatres are those which are given the first opportunity, after release, to exhibit a motion picture; second-run theatres are those which receive the second opportunity to exhibit the released picture; and third-run theatres are those which receive the third opportunity to exhibit the released picture. All theatres subsequent to the first-run are known as subsequent-run theatres. Of the first-run theatres, the so-called "metropolitan" theatres in the larger cities are, of course, much the most important.

A motion picture season is the period from September 1st of one year to August 31st of the next.

Instead of licensing their product picture by picture and theatre by theatre, wholesale licensing by distributors has been a very general practice in the industry, not only because it is advantageous to the distributor, but also because it is advantageous to the exhibitor. Such selling is not only economical, but permits both buyer and seller to know where they stand at the earliest possible time, and to plan accordingly. The seller knows what income he can reasonably count on, and the buyer knows that he has a commitment for a supply of pictures to last him a season or more. Thus licenses were entered into with all types of exhibitors, including the smallest, for an entire season's product of features, and distributors often entered into franchises with exhibitors, assuring such exhibitors of their entire output of pictures for a number of years. Such franchises were made with all types of exhibitors. They were of great value to independent theatres in their efforts to compete with large theatre chains. Only when they were

made with large theatre chains, and contained provisions considered to be unreasonably restrictive of small exhibitors, did the complaint allege that they were illegal. In dealing with theatre circuits, or a number of theatres, so-called master contracts or "blanket deals" were made covering all of the theatres in one agreement. Formula deals were also made with theatre circuits, and these measured the film rental by a certain percentage of the national gross receipts of the particular feature licensed.

Although the defendant-distributors concededly granted "considerable" rejection rights to exhibitors when licensing wholesale, the Decree required them to grant a specified 20% in every case, permitting no flexibility whatever to accord with differing circumstances.

The number of feature motion pictures produced and distributed each motion picture season is limited. Excluding so-called "Westerns" (which are low-cost wild-west adventure pictures), there were 335 feature pictures distributed during the 1943/44 season, which was the season preceding the trial. Of these Fox released 33, Loew's 33, Paramount 31, RKO 38, Warner 19, Columbia 41, United Artists 16, Universal 49, Republic 29, Monogram 26 and Producers Releasing Corporation 20. The cost of producing a feature picture is very large, and has greatly increased in recent years, ranging from hundreds of thousands of dollars to millions.

Excluding theatres jointly owned by a major defendant with another major defendant or with an independent (totaling 1,501 theatres), the number of theatres comprised in the theatre chains of the five major defendants in the year 1945 were as follows: Paramount 1,395, Warner 501, Loew's 135, Fox 636 and RKO 109. These defendants,

taken together, controlled nearly three-fourths of the metropolitan first-run theatres, and their holdings were mainly in first-run theatres. There were several large independent circuits, none of which, however, was as important as the least important of the affiliated circuits.

Each of the "big five" was several times as large as Universal, which possessed no theatres.

The "big five", considered collectively, receive a lion's share of the film rental paid in the United States, and they distribute a very high proportion of the pictures which produce the largest receipts at the box office.

The burden of the Government's complaint, and that part of it upon which it laid the greatest stress in evidence and argument, was that the competition of independent exhibitors had been suppressed by a combination and conspiracy having the objective of dominating the exhibition business, the dominant members of which were the producer-distributor-exhibitors. It claimed that the major defendants, who as a group produced and distributed a very high proportion of the best-drawing pictures, could, as exhibitors, successfully command each other's pictures, and those of other distributors, by reason of the great buying-power of their large theatre chains, and that through them they had dominated the first-run theatre situation, particularly the metropolitan first-runs, which in turn dominated the subsequent-run theatres in the respective competitive areas.

The Government further alleged that abuse of the great buying-power which this Court has found is inherent in large circuits of theatres (as exemplified in *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173 in the case of an independent circuit) was markedly accentuated in the case of affiliated circuits to which the feature pictures of their parent pro-

ducer-distributors were permanently assured, in that the factor of affiliation introduced into film-licensing negotiations an inducement to favor affiliated theatres at the expense of unaffiliated theatres. It thus alleged (in its amended and supplemental complaint) that a "producer-exhibitor-defendant, in negotiating for the licensing of films released by it for exhibition in theatres owned and controlled by another producer-exhibitor-defendant must take into consideration the terms demanded by the other producer-exhibitor in licensing its films for exhibition in theatres owned or controlled by such first producer-exhibitor. The granting of certain terms and privileges with respect to the exhibition of one producer-exhibitor-defendant's films in another producer-exhibitor-defendant's circuit is necessarily conditioned upon the granting of similar terms and privileges by the latter with respect to the exhibition of its films in the circuit of the former".

The Government further alleged that, in consequence of their power and pre-eminence in the production, distribution and exhibition fields, the major defendants, acting in concert with each other and with the minor defendants, had been able to fix and stabilize the statuses, not only of their own motion-picture theatres, but of those of all other motion picture theatres in the same competitive areas, in respect of run to be enjoyed, admission prices to be charged, time intervals (clearances) between runs, and other less important matters, to the great detriment of independent exhibitors, who were not in a position, by reason of their small buying power, to obtain favorable runs upon which the higher admission prices could be charged, or favorable clearance as against subsequent runs, or other favorable provisions in their licensing contracts.

In support of their contentions the Government relied upon (1) the practice generally followed by motion-picture theatres of charging the same admission price for the pictures of all distributors, and the practice followed by distributors of requiring the maintenance during the run of a licensed feature of the currently-charged admission price, resulting in uniformity in the minimum admission prices specified in the licenses of all distributors; and (2) the alleged fact that over the years those motion-picture theatres which had become established in their enjoyment of particular prior runs, and as to the extent of the time interval (clearance) to follow such runs before the next showing of the picture, had usually been able to eventually obtain such runs and clearance from all or nearly all distributors in particular situations.

On the other hand Universal contended (1) that a distributor, licensing under copyright, without passing title to any tangible object, might properly obtain from the licensee a covenant against change in position in respect of admission price, to the detriment of the licensor, during the run of the copyrighted picture; (2) that similarity between the minimum admission prices specified in its license agreements and those specified by other defendant-distributors proved nothing more than that all followed the legal practice of obtaining covenants against change in position in respect of admission price during the run, to the detriment of the licensor; (3) that the run to be enjoyed by a motion-picture theatre, and the clearance to follow that run, were not matters upon which a non-theatre-owning defendant, distributing an insignificant proportion of the

best-drawing pictures, could have any substantial influence, such matters being determined, *inter alia*, by the licensed theatre's position relative to competing theatres in respect of (a) the admission price charged, (b) the nature and character of the theatre, its location and entertainment policy, and (c) its film-rental paying ability; (4) that motion-picture theatres, for practical operating reasons, and in view of their policy of charging the same admission prices, irrespective of whose pictures are being shown, and of what they cost, desire the same run and the same clearance from all distributors serving them; and (5) that when other distributors have accorded a prior run and a certain amount of clearance, to a particular theatre, Universal cannot refuse to do as well, if it is to maintain its competitive position.

The District Court found, on the basis of such similarities in action among the defendants, that the major defendants had fixed and stabilized runs, clearances and admission prices, pursuant to combination and conspiracy, as had been charged, and that the minor defendants, possessing no theatres and distributing but a small proportion of the best-drawing pictures, had participated in such combination and conspiracy. It attributed this illegal condition, however, to collective control by the defendant distributors, including the non-theatre-owning distributors, of most of the best-drawing pictures, and their practices in licensing the same, and not at all to restrictions imposed through the buying-power of the affiliated theatre chains, as condemned by this Court in the case of a much smaller independent circuit (*U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173).

Universal possessed no theatre circuit with which to influence exhibition conditions. The proportion of the best-drawing pictures which it distributed was far less than its relative size might suggest, and far too small to give it any substantial voice, by reason of its position as a distributor, in exhibition conditions, save in such exceptional situations as those in which it might be able to encourage the launching of new competitive enterprises, and in which it would obtain show-windows for its pictures through the granting of franchises.

At the end of its case and at the end of the whole case Universal moved to dismiss the Petition and Amended and Supplemental Complaint.

Thus whether or not there was a conspiracy among the theatre-owning defendants, such as the Government charges, the similarity of Universal's action, in respect of minimum admission prices, runs and clearances specified in its licenses, to that of the other defendant distributors, to the extent that it was similar, was not a proper basis upon which to hold it. The District Court specifically held that "independent distributors" were "obliged to conform" to a "fixed scale of clearances, runs and admission prices" in order "to get their pictures shown upon satisfactory runs". Yet Republic Pictures Corporation, one of these "independent distributors", is larger relative to Universal than Universal is relative to any of the "big five".

Substantial questions are thus presented which turn upon the proper inferences to be drawn from similar action under the particular circumstances and upon the distinction between dealing with members of a conspiracy, if one in fact existed, and joining "mind and hand" with them. *Cement Manufacturers' Protective Association* v. *U. S.*,

268 U. S. 588, 605-6; *U. S.* v. *U. S. Steel Corporation*, 251 U. S. 417, 447-9; *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708-9; *U. S.* v. *American Can Co.*, 230 Fed. 859, 902 (D. Md., 1916); *U. S.* v. *Standard Oil Co. of N. J.*, 47 F. (2nd) 288 (E. D. Mo., 1931); *Anderson* v. *Shipowners' Association*, 27 F. (2nd) 163 (N. D. Col., 1928), aff'd 31 F. (2nd) 539 (C. C. A. 9th, 1929), cert. den. 279 U. S. 864; *Nissen* v. *Andres, et al.*, 63 Pac (2nd) 47 (Okla. 1936); *Commonwealth* v. *Hatfield Coal Co.*, 193 Ky. 229; *U. S.* v. *Falcone*, 311 U. S. 205; *Direct Sales Co.* v. *U. S.*, 319 U. S. 703.

The second branch of the Government's case against Universal consisted of the claim that its licensing contracts with exhibitors (whether or not they were affiliated with major defendants, were circuit theatres, or were independent theatres) were in violation of the Sherman Act in various respects.

In this connection the District Court concluded that the Universal defendants violated Section 1 of the Sherman Act (Conclusion of Law, No. 8) by "agreeing *individually* with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits". In other words, even though Universal was without power to resist the demands of affiliated and large independent circuits with great buying power for favorable license terms, it was to be considered guilty of violating the Sherman Act merely by reason of the fact that it may have granted more favorable terms in certain respects (but not necessarily overall) to one licensee then to another. Such a conclusion, we submit, wrongly applies the principles of the Robinson-Patman Act, to a situation completely without its scope, and presents a substantial question.

Licensing contracts generally required that the admission prices currently being charged by the exhibitors licensed not be reduced during the run of the licensed picture. In the licensing for exhibition of a motion picture under copyright, no title passes to the positive print, which is temporarily bailed to the exhibitor in order that he may exercise the intangible rights under copyright which have been licensed to him. Upon the conclusion of the run, the positive print is returned to the distributor or shipped at his direction to another exhibitor. The most important film-licensing contracts measure the film rentals by a percentage of the gross receipts, sometimes with a minimum guarantee. Flat rental fees bear a close relationship to expected gross receipts. If the exhibitor were free to lower his current admission price, after agreeing to pay a film rental based upon gross receipts, or closely related thereto, the reasonable expectation of reward held by the licensor would be defeated.

The licensor does not prescribe any maximum admission price, and the exhibitor, if he shows other pictures or furnishes other entertainment in addition to the feature licensed, may charge what he pleases therefor.

This situation, it is submitted, presents novel and substantial questions concerning the right to specify prices in connection with copyright licenses when no title to any physical article passes. In *U. S.* v. *General Electric Co.*, 272 U. S. 476, at p. 488, and *Bement* v. *National Harrow Co.*, 16 U. S. 70, licenses to make and vend patented articles at fixed prices were upheld as legal, in view of the continuing interest of the licensor in not having his licensees compete against him, despite the fact that the title to the articles sold was at all times in the licensee. It is believed

that the continuing interest of a copyright owner entitle him to insist upon a covenant against reduction in a current admission price, upon the faith of which he has agreed to accept a specified film rental, no right of the licensee to sell a tangible article owned by him at his own price being involved.

The legality of completely exclusive licenses under copyright, as of the common-place exclusive license under a patent, would not seem to be open to doubt (*Interstate Circuit* v. *U. S.*, 306 U. S. 208, at pp. 227-8). In the motion picture industry, however, distributors have not granted, and exhibitors have not insisted upon, completely exclusive licenses. Prior runs, with clearances between runs, have sufficed to meet the needs of both distributors and exhibitors. This custom seems to have suggested to subsequent-run exhibitors the idea that they are entitled to receive a picture at some "reasonable" time after the preceding run, whereas the true principle must be, as in the case of a patent, that such restrictions as are imposed are for the benefit of the licensor, and are valid if reasonably related to the reward he is entitled to secure under his legal monopoly. *General Electric Co.* v. *U. S.*, 272 U. S. 475; *General Talking Pictures Corp.* v. *U. S.*, 305 U. S. 124, 127.

The District Court recognized that clearance might be granted to an extent reasonably necessary to protect the licensee's run, but either overlooked the fact that greater clearance might sometimes subserve the licensor's legitimate interests (as with an exclusive license), or diminished the licensor's rights as a species of punishment, which is inadmissible. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386. It placed upon Universal the impossible and illegal burden of sustaining the reasonableness, from the stand-

point of the exhibitor's interests, not the public's or its own, of all clearances granted, without prescribing any adequate standards for the determination of what would be reasonable. Yet under the competitive bidding system prescribed by the Court the exhibitor is the one who fixes the clearance. Decree, II 8(c).

Universal believes that the District Court thus seriously erred in encroaching upon its legal rights under its copyright monopolies to grant exclusive licenses, with any restriction normally and reasonably related to the reward to which its copyrights entitled it.

At the same time that the District Court permitted the protection of the licensee's run by clearance, it held illegal the specification by the licensors of differentials in minimum admission prices, calculated to encourage as many patrons as possible to see their pictures first-run at the highest admission prices. Yet both license provisions are patently directed to the same end. Universal contends that such action is legal, and does not violate either Section 1 or 2 of the Sherman Act.

Although approving clearance as a necessary institution, the District Court enjoined each distributor from agreeing *with exhibitors* "to maintain a *system* of clearances". (Emphasis ours). Since in the ordinary course of business a distributor granting clearances would necessarily grant them to many exhibitors, and since in the case of minimum admission prices the Court had clearly regarded such dealings as an illegal *system* of fixed prices, petitioners submit that a substantial question is involved as to the propriety of this injunction, and as to its validity in view of its vagueness.

Franchises, in which a distributor commits its pictures for periods longer than one year to an exhibitor, are con-

siderably less restrictive than the ordinary exclusive agency arrangement, which is one of the most common methods of doing business, and as a result of the law having been settled by numerous authoritative cases, obtains throughout all industry. The exclusive feature in a franchise is limited to the particular run on which the exhibitor operates, and subsequent run exhibitors can thereafter obtain the pictures. Of Universal's nearly 800 franchises, less than 1% are for longer than three years, and all but 43 are with independent exhibitors.

If franchises were availed of by the producer-exhibitor defendants as a means to effectuate a combination and conspiracy, the Decree may, of course, properly suppress such franchises, whether or not granted by innocent or participating parties. It may, indeed, properly go further and prohibit the accepting of such franchises in the future by such defendants, pending the dissipation of the effects of the assumed conspiracy. The District Court, however, broadly condemned the franchise *as an institution*. As we later point out, it ordered all feature pictures to be sold picture by picture and theatre by theatre through competitive bidding. The combined effect of the prohibition against franchises as an institution and the affirmative direction of picture by picture selling is to prevent the small independent exhibitor from obtaining any commitment of pictures whatever from any distributor for any period of time, no matter how short, and to force him into the hopeless position of attempting to live from hand to mouth by bidding in the open market for each picture desired, against the powerful competition of affiliated and independent circuit theatres. Although such franchises were declared invalid, their validity was not an issue in the case, since the only

complaint about franchises was concerned with those made with large circuits. These, it was claimed, discriminated against small exhibitors.

Thus, we submit, a substantial question is presented as to whether the decree properly enjoins exclusive-dealing arrangements, in the form of licenses under copyright, with the alleged victims of a conspiracy.

At the same time this unrestricted condemnation of franchises crippled Universal, a relatively small distributor, in its efforts to compete with the large integrated companies. Paragraph IV of the Decree specifically saved to the integrated companies the right to freely show the motion pictures produced by them in their own theatres. Yet by reason of the condemnation of franchises with small exhibitors, and the requirement of picture-by-picture selling, Universal is prevented, unless it is able and willing to buy theatres outright, from arranging to have its pictures regularly shown in theatres strategically located throughout the country, i.e., from having and obtaining show-windows for its pictures.

It is submitted that Universal has just as much right under the Sherman Act, if indeed not much more right, to obtain show-windows for its pictures by long-term contractual arrangements with small exhibitors as the powerful integrated companies have to retain such show-windows through ownership of the theatres involved, and that the denial of this right presents a substantial question.

This Court approved the legality of exclusive agencies in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568. In *Restatement of the Law of Contracts*, c. 18, Sec. 516, exclusive agency contracts are listed as one of the well-established categories of reasonable restraints of trade. Many cases to this effect are cited in *Williston on*

Contracts, Section 1645. This is particularly true, we submit, where a medium-sized distributor is dealing with a small exhibitor, and the exclusive agency is limited in time and area. *A fortiori* is it true where the exclusive agency is granted by license under copyright.

It is likewise submitted that the injunction against Universal's entering into master agreements, irrespective of circumstances, and of the status and purposes of the other contracting party, is unwarranted.

In imposing upon Universal the duty of selling its pictures picture-by-picture and theatre-by-theatre to the highest bidder having an adequate theatre, and the duty of serving applicants for non-exclusive runs on uniform terms, and in prescribing the many other features of the competitive bidding system as set forth in the Assignments of Error, the District Court has, we believe, gone beyond anything heretofore approved by this Court as a proper remedy for violation of the Sherman Act. In both *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 at p. 728, and *Associated Press* v. *U. S.*, 326 U. S. 1, at p. 25, it is to be noted that the Supreme Court deliberately refused to approve requests of the Government for relief tending in the same direction as the competitive bidding and service upon uniform terms decreed in this case, but going not nearly as far. The fact that competitive bidding or non-discriminatory service requirements may be, under some circumstances, appropriate regulatory devices, when imposed by an administrative commission under authority of an Act of Congress, does not mean that they are authorized judicial sanctions, taking away as they do "the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *U. S.* v.

Colgate Co., 250 U. S. 300, at p. 307, *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565 at p. 573. Were they authorized by statute, as they are not, we submit that such sanctions would violate the due process clause of the Fifth Amendment. We contend that imposition by a Court likewise violates such clause. Similar considerations apply to the requirements that Universal may not "discriminate" in favor of old customers, and must not "arbitrarily" refuse a run, especially in view of the failure to prescribe adequate standards in the latter respect.

The foregoing is entirely aside from the many patent deficiencies in the competitive bidding method set up by the Decree. To cite only one, it is provided that the exhibitor may offer to license a picture upon a flat rental or for a percentage of the gross receipts, and that the distributor is to accept the bid of the highest bidder. Yet it should be plain that if one exhibitor offers $1,000 for a picture and another offers 25% of his gross receipts, it will be impossible to determine which is the highest bidder. The distributor, moreover, is forbidden to offer its pictures on a percentage basis, a wholly normal method of doing business.

Thus a number of substantial questions are presented by these provisions of the Decree.

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, this Court held that the required purchase of articles in combination by a seller having no power to control or dominate the market was not an unfair method of competition. In a dissenting opinion protesting the dismissal, as a matter of law, of the Federal Trade Commission's complaint, Mr. Justice Brandeis said, page 438, "It is *obvious* that the imposition of such a condition (that cotton bagging be bought in order to get steel ties to bind cotton bales) is not necessarily and universally an unfair method; but that it may be such under some circumstances seems equally clear."

(Emphasis ours.) He then pointed out that the ability of the seller to dominate the business was a crucial consideration. Universal, of course, does not by any stretch of the imagination possess any such power.

In *Federal Trade Commission* v. *Paramount Famous-Lasky Corporation*, 57 Fed. 2nd 152 (C. C. A. 2, 1932), the practice of block booking was held to be legal, largely on the ground that the evidence did not show that the defendant dominated the business, although in fact it was then one of the largest factors, if not the largest factor, in the business. Universal is now indisputably a relatively small factor in the business. In the *Gratz* and *Paramount Famous-Lasky Corporation* cases the sole matter at issue was the legality of combination sales under the particular circumstances, and a large amount of evidence dealing with the practice and various aspects thereof was considered. In the instant case the record with relation to so-called "block-booking" is so fragmentary as to be virtually non-existent. Indeed, there is not even any evidence in the record that the sale of one picture was conditioned upon the sale of others. All that appears is that Columbia and Universal generally sold a season's product at one time. It is of great importance to the smaller distributors and exhibitors that they be able to sell and buy a season's product at one time, since this enables them to better compete with their much larger competitors. It is respectfully submitted that a substantial question is here involved.

Respectfully submitted,

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